FILED
MAR 28 1989
JOSEPH F. SPANIOL, JR
CLERK

(2)

No. 88-1421

IN THE

Supreme Court of the United States

October Term, 1988

PETE MONDOZZI,
Petitioner,

vs.

AKRON BOARD OF EDUCATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Petitioner in this individual action brought pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.*, presented the District Court with any evidence to create a genuine issue of material fact and thus preclude the grant of summary judgment for the Respondent.

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STATEMENT OF THE CASE

Both Petitioner's Statement of the Case and Statement of the Facts are riddled with inaccuracies and omissions of important facts. Respondent will, therefore, correct those inaccuracies and omissions by the following.

In 1980, Petitioner, then age 46, applied for promotion to the position of Coordinator, Diversified Cooperation Training (DCT), Distributive Education (DE), Occupational Work Adjustment (OWA) and Occupational Work Experience (OWE). The position of Coordinator, DCT, DE, OWA, OWE is a supervisory position within Respondent's Vocational Education department and involves essentially the coordination of the instructional programs for the four work/study co-op programs (DCT, DE, OWA, OWE). Petitioner was rejected as "not recommended" by the screening committee which recommended three other applicants for the position: Stanley Gustely, Jane Barrett, and Tim McGuckin. Stanley Gustely, then age 53, was eventually appointed to the position.

When Stanley Gustely subsequently announced his retirement in December, 1985, Petitioner, then age 52,[1] again applied for promotion to the position. Petitioner's application, along with those of all of the other applicants, was referred to a newly appointed screening committee for the position.

The screening committee interviewed 11 applicants for the Coordinator position, using a pre-established list of questions developed by screening committee members as a guideline for the interviews. The attributes which the screening committee was looking for in interviewing the applicants included, among others, the ability to communicate, organization skills, the ability to work with others, and demonstrated leadership through such activities as work on curriculum committees, assisting in setting up in-service programs, and/or assisting in micro-computer related programs or activities. Subsequent to

[1] In his brief, Plaintiff states that he was 53 at the time of his application. However, the record evidence before the courts below indicates that Petitioner was 52 years of age at that time.

the interviews, the screening committee, after discussion, reached a consensus on the top three applicants to be recommended for the position: Howard Lawson (age 36), Thomas Maglione (age 47), and Jane Barrett (age 51), one of the candidates previously recommended in the 1980 selection process. Petitioner was not among the top three applicants recommended for selection due to what the screening committee members perceived to be his relative lack of effective communication, organization, and leadership skills. Howard Lawson was unanimously recommended as the best applicant because, in addition to his communication and leadership skills, and extra-curricular activities, which the two other recommended applicants possessed, Lawson was a leader in working with fellow teacher/coordinators and developing programs, while additionally working extensively with micro-computers.

The Proceedings Below

Petitioner filed suit in the United States District Court for the Northern District of Ohio alleging he was rejected for promotion to the Coordinator position in 1986 because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* (ADEA). At the close of extensive discovery, Respondent filed a motion for summary judgment asserting that no genuine issue of material fact existed and that Petitioner could neither prove a *prima facie* case of age discrimination, nor meet his ultimate burden of proving by a preponderance of the evidence that his age was a determining factor in his non-promotion. Respondent's motion was supported by deposition testimony and affidavits. After an in-depth analysis of the evidence and arguments presented by both parties, the District Court granted summary judgment for Respondent, finding that Petitioner was unable to establish a *prima facie* case of age discrimination, using the formulation announced by this Court in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981). The Court of Appeals for the Sixth Circuit affirmed the decision of the District Court without opinion.

SUMMARY OF ARGUMENT

The decision below does not conflict with the Court's established principles for analyzing cases alleging discrimination in employment. Similarly, the courts below correctly applied the Rule 56 standards for summary judgment which have been enunciated by this court. There are no important or special reasons for the Court to grant a writ of certiorari in this case. This appeal is merely a desperate attempt by an unsuccessful plaintiff to have his unsupported claims of age discrimination reviewed for yet a third time.

ARGUMENT REGARDING REASONS WHY THE WRIT SHOULD BE DENIED

I. The Decision Below Does Not Conflict With Principles Established By This Court.

The decision of the District Court for the Northern District of Ohio, affirmed by the Court of Appeals for the Sixth Circuit, merely applied existing principles regarding the burden of proof in employment discrimination cases that were first established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and further refined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). Those cases set forth a three stage analysis of the burdens of production and persuasion in cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* While this Court has never decided the issue as to whether this three stage analysis should be applied to cases brought pursuant to the ADEA, every court of appeal, including the Sixth Circuit, has embraced this analysis for age claims. *See e.g., Riley v. University of Lowell*, 651 F.2d 822, 824 (1st Cir. 1981); *Pena v. Brattleboro Retreat*, 702 F.2d 322, 324 (2nd Cir. 1983); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395-96 (3rd Cir.), *cert. denied*, 469 U.S. 1087 (1984); *EEOC v. Western Electric Co., Inc.*, 713 F.2d 1011, 1014 (4th Cir. 1983); *Reeves v. General Foods Corp.*, 682 F.2d 515, 520-24 (5th Cir. 1982); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1180 (6th Cir. 1983); *Oxman v. WLS-TV*, 846 F.2d 448, 452 (7th Cir. 1988); *Leichihman v. Pickwick International*, 814 F.2d 1263, 1269 (8th Cir.), *cert. denied*, _____ U.S. _____, 108 S. Ct. 161 (1987); *Douglas v. Anderson*, 656 F.2d 528, 531 (9th Cir. 1981);

Schwager v. Sun Oil Company of Pennsylvania, 591 F.2d 58, 60-61 (10th Cir. 1979); *Anderson v. Savage Laboratories, Inc.*, 675 F.2d 1221, 1224 (11th Cir. 1982); *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 342 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983).

Petitioner incorrectly states in his Petition that the Sixth Circuit Court of Appeals has "consistently refused to apply the *McDonnell Douglas* standards of proof in an age discrimination context." While, in early cases decided under the ADEA, the Sixth Circuit questioned whether the three stage analysis should be presented to a jury for consideration, it has in later cases applied the analysis consistently. *See, e.g., Blackwell v. Sun Electric Corp.*, 696 F.2d at 1180; *Grubb v. W.A. Foote Memorial Hospital, Inc.*, 741 F.2d 1486, 1498 (6th Cir. 1984), *vacated on other grds. on rehearing*, 759 F.2d 546 (6th Cir.), *cert. denied*, 474 U.S. 946 (1985); *Ridenour v. Lawson Co.*, 791 F.2d 52, 55-56 (6th Cir. 1986); *Wilkens v. Eaton Corp.*, 790 F.2d 515, 520-521 (6th Cir. 1986); *Chappell v. GTE Products Corp.*, 803 F.2d 261, 265-66 (6th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987); *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 940-945 (6th Cir. 1987); *Cf. Loeb v. Textron*, 600 F.2d 1003, 1010 (1st Cir. 1979); *Smith v. University of North Carolina*, 632 F.2d 316, 334 (4th Cir. 1980).

Upon review of the cases cited by Petitioner, it is clear that what the Sixth Circuit has consistently refused to do is mechanically adopt, in cases involving discharged older workers, the four-part formulation set forth by this Court in *McDonnell Douglas* for establishing a *prima facie* case of hiring discrimination. That such an approach is in conflict with the approach of the other courts of appeals, however, is more illusory than real. Rather, by adopting such an approach, the

Sixth Circuit has merely followed the principles set forth by this Court in *McDonnell Douglas* and those cases further interpreting that decision.

When this Court first articulated the elements of a *prima facie* case in *McDonnell Douglas*, it recognized that "specification . . . of the *prima facie* proof required from Respondent is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n.13. *See also Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). (The *McDonnell Douglas* test "was never intended to be rigid, mechanized or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination"); *Aikens*, 460 U.S. at 715 (quoting *Furnco*). While in some of the cases cited by the Petitioner, the Sixth Circuit ultimately analyzed the evidence according to the *McDonnell Douglas* guidelines, each followed the principle set forth in *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 (6th Cir. 1975), and first announced in *McDonnell Douglas*, that it is inappropriate to borrow the guidelines for a *prima facie* case and automatically apply them to differing factual situations, such as discharges of older workers, specifically during the course of an economic cutback. *See, e.g., Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 69 (6th Cir. 1982); *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1090 (6th Cir. 1984); *Simpson v. Midland-Ross*, 823 F.2d at 940-41. *Accord Loeb v. Textron*, 600 F.2d at 1010; *Smith v. University of North Carolina*, 632 F.2d at 335, *Thornbrough v. Columbus Greenville R. Co.*, 760 F.2d 633, 641 (5th Cir. 1985); *Oxman v. WLS-TV*, 846 F.2d at 453; *Leichihman v. Pickwick International*, 814 F.2d at 1269; *Douglas v. Anderson*, 656 F.2d at 532-33; *Schwager v. Sun Oil Company of Pennsylvania*, 595 F.2d at 61 n.1.

In contrast to the cases cited by Petitioner in the Petition, the factual context before the District Court was not a discharge during an economic cutback, but a failure to promote during a multi-candidate, multi-stage selection process. The District Court conducted its analysis upon summary judgment according to the established *McDonnell Douglas* burden of production and persuasion. That the District Court never reached the second and third stages of the analysis was the result of its finding that the Petitioner failed to come forth with sufficient evidence to establish a *prima facie* case, *not* due to a rejection of the *McDonnell Douglas* three stage analysis.

In its determination of whether Petitioner was able to establish a *prima facie* case of age discrimination based upon Respondent's rejection of him for promotion in favor of three other candidates, the District Court applied the test set forth by the Sixth Circuit in *Grubb v. W.A. Foote Memorial Hospital*, 741 F.2d at 1497-98. In turn, in *Grubb*, the Sixth Circuit applied the *prima facie* formulation for promotion determinations set forth by this Court in *Texas Department of Community Affairs v. Burdine:* whether Petitioner set forth any evidence that he was rejected for promotion "under circumstances which give rise to an inference of unlawful discrimination." 450 U.S. at 253.

Each of the decisions of the courts of appeals in other circuits cited by Plaintiff applied *prima facie* case formulations in the context of discharges from employment. Petitioner has cited no cases which apply a *prima facie* case formulation in the context of a rejection for promotion in a multi-candidate, multi-stage process which conflicts with that of the Sixth Circuit or this Court. Thus, the first reason raised by Petitioner for this Court to review the decision of the District Court has no merit.

II. No Special And Important Reasons Exist For Granting A Writ Of Certiorari Because The District Court's Decision Granting Summary Judgment Is Consistent With The Applicable Decisions Of The Supreme Court.

As an alternative ground for granting his Petition, the Petitioner asserts that the courts below departed from the standards for summary judgment. However, the summary judgment entered by the District Court, and affirmed by the Sixth Circuit, was squarely within this Court's decisions setting forth guidelines for granting summary judgment, decisions ignored by Petitioner in his argument.

Contrary to Petitioner's assertions, this Court has noted that the procedural device of summary judgment, rather than a "disfavored procedural shortcut," is an integral part of the Federal Rules of Civil Procedure which assures not only a plaintiff's right to have those claims which are adequately based in fact tried to a jury, but a defendant's right to demonstrate prior to trial that the plaintiff's claims have no basis in fact. *Celotex Corp., v. Catrett,* 477 U.S. 317, 327 (1986). *Accord Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). Summary judgment is to be awarded to the moving party when the non-moving party fails "to make a sufficient showing on an essential element of [his or] her case with respect to which [he or] she has the burden of proof." *Celotex,* 477 U.S. at 323. Should the non-moving party fail to make a sufficient showing, the court must determine that no genuine issue as to material fact exists, "since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts

immaterial." *Celotex*, 477 U.S. at 323. The fact that a non-moving party produces some evidence in support of his case is insufficient to avoid summary judgment. *Anderson*, 477 U.S. at 249-51.

In the case below, the District Court held that Petitioner failed to make a sufficient showing that he was rejected under circumstances giving rise to an inference of discrimination, an essential element of his *prima facie* case with respect to which he had the burden of persuasion. *Burdine*, 450 U.S. at 253. Thus, the District Court's determination correctly followed and applied the standards for summary judgment enunciated by this Court. Petitioner, nonetheless, is attempting to avoid the result of this correct application by asserting a conflict in the courts of appeals over the method for proving pretext in age discrimination cases, and by arguing that the District Court improperly granted summary judgment in this case. Petitioner's attempts, however, are misguided.

As is clear from a review of the District Court's opinion, reproduced in the Appendix to the Petition, the issue of whether Petitioner raised sufficient evidence of pretext to avoid summary judgment was never reached in this case. That is because the Court found that Petitioner failed to present sufficient evidence to meet his initial burden of presenting a *prima facie* case of discrimination, the first stage of the *McDonnell Douglas* three stage analysis. Thus, the method by which a plaintiff in the Sixth Circuit can establish that his employer's reasons for rejecting him for promotion are pretextual is not an issue properly before this Court.

Had it been necessary for the District Court to have reached the pretext issue in the case below, the existence of a split of authority over the manner of proving pretext

would be irrelevant, nonetheless. This is because Petitioner presented no *evidence,* apart from conclusory allegations, to the courts below that the reasons given by Respondent for rejecting Petitioner for the position of Coordinator, DCT, DE, OWA, OWE were untrue. The alleged evidence raised in his Petition, apart from the fact that he was a teacher for 25 years, was never presented to the District Court. Petitioner's conclusory allegations—that the candidate ultimately selected did not meet the qualifications of the posting for the position in question and that Petitioner was the most qualified of all the candidates selected, each of whom was a teacher/coordinator like Petitioner—are contrary to the record evidence presented by Respondent in its motion for summary judgment and have no basis in fact.[2]

As for Petitioner's so-called direct evidence of age discrimination, the courts of appeals have correctly noted that an ambiguous age-related comment, such as the one allegedly made by the chairman of the selection committee, is insufficient to support a finding that age was a motivating or determining factor in an employment related decision. *See, e.g., Grubb v. W.A. Foote Memorial Hosp., Inc.,* 741 F.2d at 1498; *Ballinger v. North Carolina Agricultural Extension Service,* 815 F.2d 1001, 1006 (4th Cir.), *cert. denied,* _____ U.S. _____, 108 S. Ct. 232 (1987).

[2] Petitioner's selective inclusion in the appendix of only one part of the record is a gross distortion of what the full record contains. Not only was it established that academic certification is irrelevant for the position in question, but of the 25 certifications listed for Petitioner in the appendix, only four were in effect at the time he was considered by the screening committee. In addition, the record evidence disclosed that none of the applicants had vocational supervisory certification, as experience in a vocational supervisory position was a requirement for such certification. Finally, it was undisputed by Petitioner in the courts below that the three candidates selected by the screening committee over Petitioner were qualified for the job.

Petitioner is attempting to accomplish with this Court that which he could not accomplish in the courts below: to avoid summary judgment and proceed to trial before a jury based upon mere conclusory allegations, unsupported by evidence, that he was better qualified for the Coordinator position than the three finalists selected. The District Court's opinion amply demonstrates how Petitioner utterly failed to comply with the Federal Rule 56(e) requirement that evidence setting forth specific facts showing there is a genuine issue for trial must be presented by the non-moving party confronted with a properly supported motion for summary judgment. Fed. R. Civ. P. 56(e). As in the courts below, Petitioner's attempt here must fail.

Petitioner's suggestion that the minimal evidence he presented in response to Respondent's summary judgment motion is typical of the kind of evidence presented in age discrimination cases which proceed to trial is a gross distortion of the record in the courts below. Rather, the evidence supporting Petitioner's claim can at best be described as a mere scintilla of evidence, which amount has been declared by this Court as insufficient to withstand a motion for summary judgment. *Anderson, supra* at 249-51. As this Court held in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-90 (1968) in the context of an antitrust case, but equally applicable to age discrimination cases:

> . . . To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of their allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the

> importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

Accord Anderson, 477 U.S. at 256-257. *See also Oliver v. Digital Equipment Corp.*, 846 F.2d 103, 109 (1st Cir. 1988); *Goldberg v. B. Green and Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1988); *Klein v. Trustees of Indiana University*, 766 F.2d 275, 282 (7th Cir. 1985); *Foster v. Arcata Associates*, 772 F.2d 1453, 1459 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986).

Petitioner's argument that he was deprived of the opportunity of demonstrating pretext through cross-examination at trial is, likewise, specious. Respondent did not move for summary judgment until after the close of discovery where Petitioner took advantage of the opportunity to extensively cross-examine upon deposition each of the selection committee members.[3] Further, the acceptance of Petitioner's argument would effectively require the elimination of summary judgment and require trial in even the most meritless claims. Such a result is clearly contrary to the requirement of Federal Rule 56(e) that rather than speculate about what could be elicited during cross-examination at trial, Petitioner

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[3] The deposition testimony of the selection committee members demonstrated that they possessed a good faith belief that the three recommended candidates possessed greater communication and organization skills, and greater leadership than Petitioner and, hence, were more qualified for the position. Petitioner elicited no facts during discovery by way of cross-examination or otherwise to indicate that these beliefs were not so held.

must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250. When a non-moving party fails to come forward with specific facts, as Petitioner failed to do in this case, Federal Rule 56 requires that summary judgment be awarded to the moving party. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 323.

Thus, the District Court's decision in this case is entirely consistent with the decisions of this Court which set forth the well-established principles for determining when summary judgment is appropriate. As such, there is no reason for the Court to review the decision below.

III. Petitioner's Attempt To Charge The District Court With Creating Improper Presumptions Is Unfounded.

Petitioner's final argument in his attempt to demonstrate that summary judgment was improperly granted is that the District Court weighed evidence regarding the ages of the selection committee members and two of the final candidates for the position, thereby creating a presumption that the selection process was non-discriminatory. As he did in the Court of Appeals in an attempt to overturn the District Court's judgment, the Petitioner confuses the act of weighing evidence with that of assessing whether the non-movant has presented sufficient evidence on an essential element of his case to avoid summary judgment. As is clearly demonstrated in the District Court's opinion, the Petitioner failed to present sufficient evidence from which a jury could reasonably infer that he had been rejected under circumstances giving rise to an inference of discrimination, an essential element of Petitioner's *prima facie* case. A review of the opinion provides no indication that the District Court either improperly weighed the evidence or created the presumptions claimed by Petitioner. Thus, Petitioner's suggestion that the decision by the District Court is the first step in a process of undermining effective enforcement of the ADEA is utterly without foundation.

CONCLUSION

The courts below correctly applied the standards developed by this Court for analyzing cases alleging discrimination in employment. Following this Court's guidance in recent decisions, the District Court correctly applied the proper standard for ruling upon motions for summary judgment. Therefore, as no special and important reasons exist for this Court to review the decision of the District Court or the Court of Appeals, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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